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IN THE
COURT OF APPEALS OF INDIANA

JOSHUA BORLAND,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0509-CR-532
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge,
The Honorable William Robinette, Master Commissioner
Cause No. 49G03-0410-FB-188583

September 25, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Joshua Borland appeals his conviction of burglary as a Class B felony.[1] The trial court did not abuse its discretion in excluding certain testimony[2] and the evidence was sufficient to support Borland's conviction. However, the trial court erred when it failed to vacate Borland's conviction of theft. Thus, we affirm and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Rick Dye lives across Lyons Avenue from Robin and Douglas Foster in Indianapolis. On September 2, 2004, Dye was sitting on his porch when Borland approached and asked him when the Fosters would be home. Dye replied he did not know and would not tell Borland if he did. Borland walked away and, as Dye watched, circled the Foster residence. Dye heard the Fosters' screen door rattle before Borland returned to the street. Borland walked past Dye's house again and circled the Foster house a second time. Then Borland opened an unused coal chute on the side of the house and crawled inside. About fifteen minutes later, Borland crawled back out of the coal chute and left.

Dye called Douglas Foster at his work, asking whether Borland was supposed to be in Foster's house, and then called the police to report the burglary. The Fosters discovered DVDs, jewelry, and two prescription painkillers had been taken from their

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[1] Ind. Code § 35-43-2-1.

[2] Borland frames the issue as whether the trial court abused its discretion in granting the State's motion *in limine*. However, an order *in limine* is not a final ruling on the admissibility of evidence, *Simmons v. State*, 760 N.E.2d 1154, 1158 (Ind. Ct. App. 2002), and appellate review must be based on the final evidentiary rulings at trial. *Carter v. State*, 634 N.E.2d 830, 832 (Ind. Ct. App. 1994).

house. A week later, Dye identified Borland in a photo array as the person who had broken into the Fosters' house.

Borland was charged with burglary as a Class B felony and theft as a Class D felony.[3] Prior to trial, the State filed a motion *in limine* to prevent the defense from presenting evidence regarding a look-alike in the neighborhood. Over Borland's objection and after a proffer by counsel, the trial court granted the State's motion *in limine*.[4] The jury found Borland guilty of burglary and theft. After merging the two convictions, the trial court sentenced Borland to six years for burglary, suspended the entire sentence, and placed him on probation for two years.

DISCUSSION AND DECISION

1. Exclusion of Evidence

The exclusion of evidence by the trial court will not be reversed absent an abuse of discretion resulting in the denial of a fair trial. *Trotter v. State*, 838 N.E.2d 553, 559 (Ind. Ct. App. 2005). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.* An offer to prove is an offer from counsel regarding what a witness would say if allowed to testify and consists of three parts: the substance of the evidence, an explanation of its relevance and the proposed grounds for its admissibility. *Collins v. State*, 835 N.E.2d 1010, 1015 (Ind. Ct. App. 2005), *trans. denied*. The purpose of an offer to prove is to

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[3] Ind. Code § 35-43-4-2.

[4] Borland's counsel made additional proffers during trial.

enable both the trial court and the appellate court to determine the admissibility and relevance of the proffered testimony. *Gouge v. Northern Ind. Commuter Transp. Dist.*, 670 N.E.2d 363, 368 (Ind. Ct. App. 1996). Evidence is relevant if it has any tendency to make the existence of any material fact more probable or less probable than it would be without the evidence. Ind. Evidence Rule 401.

In his offer of proof, defense counsel indicated three witnesses would testify another person who looked like Borland was in the community in the weeks before and after the burglary, including on the day of the burglary. Each witness mistook the look-alike for Borland, but none knew his name. Counsel stated the purpose of this evidence was to show Dye "could very well have been mistaken about who he saw." (Tr. at 32.)

Because this case involves Dye's identification of Borland, the presence of a look-alike in the community is arguably relevant. However, we will not reverse the trial court's decision to exclude arguably relevant evidence "unless there is a showing that the trial court's discretion was manifestly abused and that the defendant was denied a fair trial." *Jackson v. State*, 490 N.E.2d 1115, 1118 (Ind. 1986).

In *Jackson*, William Jackson was charged with the attempted robbery of a Church's Fried Chicken restaurant. Four hours prior to the attempted robbery, Jackson placed an order at the drive-thru and was waited on by Wilbert Shelby. Jackson had been Shelby's barber for a few years. When Jackson returned to rob the restaurant, another employee was at the drive-thru window but Shelby, unaware a robbery was in progress, came to the window and greeted Jackson by name. Jackson responded his name was not Jackson, winked at Shelby, and then fled after firing a shot into the ceiling.

At trial, Jackson sought to elicit testimony from one of his friends regarding a possible look-alike. "The offer of proof was that [the witness] would have testified that at approximately the time this crime occurred she encountered another man whom she mistakenly believed to be Jackson." *Id.* at 1117. From this testimony, Jackson "presumably wanted the jury to infer that Shelby similarly may have mistakenly believed it was the defendant who attempted to rob the restaurant." *Id.* at 1117-18.

Here, as in *Jackson*, the object of the offered testimony was "to suggest the possibility that in a community of several hundred thousand people there might be someone who could be mistaken for [the defendant]"—a possibility the jury is likely to have accepted without any testimony. *Id.* at 1118. Because the testimony did not link the look-alike to the burglary, the jury would also be required to speculate regarding a connection between the look-alike and the burglary. Thus, we conclude the trial court did not abuse its discretion in excluding this testimony.[5]

2. Sufficiency of the Evidence

In reviewing sufficiency of the evidence, we will affirm a conviction if, considering only the probative evidence and reasonable inferences supporting the verdict, and without weighing evidence or assessing witness credibility, a reasonable trier of fact

[5] Borland argues the trial court's ruling prevented him from presenting a defense as guaranteed by the Sixth Amendment to the United States Constitution. A defendant may establish his innocence by showing some other person committed the crime charged. *Williams v. State*, 600 N.E.2d 962, 965 (Ind. Ct. App. 1992). "But the mere possibility that some third person did the act is not enough. Evidence tending to incriminate another must be competent and confined to substantive facts which create more tha[n] a mere suspicion that such other person committed the particular offense in question." *Id.* The evidence Borland sought to present cast "mere suspicion" on an unknown third person and was not the competent and substantive evidence required to demonstrate his innocence.

could conclude the defendant was guilty beyond a reasonable doubt. *Herron v. State*, 808 N.E.2d 172, 176 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 968 (Ind. 2004).

Borland argues the only evidence of identification is "the uncorroborated and unreliable testimony of a single eyewitness," (Br. of Appellant at 8), and asserts "Dye's certitude [Borland] burglarized the Foster[s'] house is improbable." (*Id.* at 9.) We decline Borland's invitation to assess the credibility of Dye's testimony, *see Herron*, 808 N.E.2d at 176, and consider only whether a reasonable trier of fact could conclude Borland was the person Dye saw entering the Fosters' house.[6]

Dye's testimony indicates the following. Dye was somewhat familiar with Borland and had seen him in the neighborhood prior to the burglary. Dye was sitting on his front porch when Borland, who was standing in the middle of Lyons Avenue, spoke to him just prior to the burglary. Dye then saw Borland enter the Fosters' house through the coal chute and exit the same way about fifteen minutes later. Dye also saw Douglas Foster and Borland arguing in the street shortly after the burglary. Dye's description of Borland's clothing—Carolina Blue satin sweats—each time he saw Borland on the day of the burglary was consistent. Dye identified Borland in a photo array a week after the burglary. Dye also made an in-court identification of Borland as the person he had seen enter and exit the Fosters' house through the coal chute. A reasonable trier of fact could conclude Borland had entered the Fosters' house and, thus, the evidence is sufficient to support Borland's conviction of burglary.

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[6] Borland does not appear to challenge a burglary occurred, only that he committed it.

3. Improper merger

Borland was charged with burglary as a Class B felony and theft as a Class D felony. A jury found Borland guilty of both burglary and theft and the trial court entered judgment of conviction on both counts. At sentencing, the following colloquy occurred:

> THE COURT: And at the jury trial, sir, on the Count I, you were found guilty of burglary, a Class B Felony, as charged in Count I. And on Count II, you were found guilty of theft, a Class D Felony, as charged in Count II. *It's my opinion that Count II merges with Count I. Is that the consensus of the parties, also?*
>
> [DEFENSE:] That's the Defense's position, as well, Judge.
>
> [STATE:] *I'll leave the matter to the Court's discretion, Your Honor.*

(Tr. at 222-23) (emphases supplied).[7] The trial court then "merged" the two counts and sentenced Borland only on the burglary conviction. The trial court did not, however, vacate Borland's theft conviction. We have explained that when a trial court merges two offenses, imposes one sentence, but enters judgment of conviction on both offenses, one of the convictions must be vacated to avoid double jeopardy. *Jones v. State*, 807 N.E.2d 58, 67 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 969 (Ind. 2004); *see also Kochersperger v. State*, 725 N.E.2d 918, 925-26 (Ind. Ct. App. 2000). Because we assume without deciding there was a double jeopardy violation, such is the case here.

[7] Theft was the felony alleged in the information for burglary, and the primary evidence of Borland's intent to commit the alleged felony at the time he broke into the Foster home appears to have been the commission of the theft itself. As a result, the trial court may have believed this violated the double jeopardy provisions of the Indiana Constitution under the "actual evidence" test enunciated in *Richardson v. State*, 717 N.E.2d 32, 52-53 (Ind. 1999). Regardless of whether the trial court was required to merge the convictions, however, the record is clear the State did not object to the merger.

Accordingly, we remand to the trial court with instructions to vacate Borland's theft conviction.[8]

The trial court did not abuse its discretion in excluding testimony regarding a look-alike and the evidence is sufficient to support Borland's conviction of burglary. The trial court erred in entering a judgment of conviction for theft. Accordingly, we affirm and remand with instructions

Affirmed and remanded with instructions.

SULLIVAN, J., concurs.

BAKER, J., concurring in part and dissenting in part with opinion.

[8] The dissent suggests we remand "so that the trial court could revise the sentencing statement to impose a concurrent sentence for Borland's theft conviction." Slip op at10. We do not believe this is an appropriate course of action. Because the State failed to object to or challenge the trial court's merger decision, it would have been estopped, under the doctrine of invited error, from raising the issue on appeal. *See, e.g., Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005) ("Because the state created this situation by inviting the merger, it cannot now take advantage of that error on appeal."). We need not *sua sponte* provide relief to the State that it has not sought and could not have received. Nor is it appropriate for us to usurp the role of the prosecution or the trial court by attempting to do what neither sought to do.

This is not a situation where the trial court erroneously failed to remedy a double jeopardy violation. Faced with such a case, we would be obliged to reverse one of the convictions *sua sponte*.

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BAKER, Judge, dissenting in part.

I respectfully dissent from the majority's conclusion regarding the trial court's merger of Borland's convictions for burglary and theft. It has long been established that sentencing a defendant on both burglary and theft does not violate Indiana's double jeopardy clause. E.g., Moffatt v. State, 542 N.E.2d 971, 975 (Ind. 1989); Payne v. State, 777 N.E.2d 63, 68 (Ind. Ct. App. 2002). Our Supreme Court reached that conclusion after considering the elements of the respective offenses:

> Burglary consists of the breaking and entering of a building or structure with the intent to commit a felony; theft is the unauthorized control over property of another person with the intent to deprive the other person of its value. Thus, to obtain a conviction for burglary, it is not necessary for the State to prove the defendant committed theft or any other felony because the burglary is completed upon breaking and entering with intent to commit a felony. A conviction for theft may occur without the proof of a breaking and entering.

Moffatt, 542 N.E.2d at 975 (citations omitted).

Moreover, here, the actual evidence used to convict Borland of these crimes was not the same, inasmuch as evidence regarding his entry through the coal chute supported the burglary conviction and evidence regarding the Fosters' missing possessions supported the theft conviction. See Vestal v. State, 773 N.E.2d 805, 807 (Ind. 2002) (finding that evidence establishing commission of theft did not also establish that the defendant broke and entered, and vice versa). Thus, it is apparent to me that the trial court misspoke when it merged the two counts, and I would remand so that the trial court could revise the sentencing statement to impose a concurrent sentence for Borland's theft conviction. I concur in all other respects with the majority opinion.